Supreme Court, U.S.
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No. 91-974

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1991

ROBERT LEE HOLLAND,

Petitioner,

v.

FIRST VIRGINIA BANKS, INC.

and

DONALD BRENNAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Petitioner Robert Lee Holland replies as follows to the respondents' brief opposing the issuance of a writ of certiorari.

Procedural Note

At the time petitioner filed his petition for writ of certiorari, there was pending in the Fourth Circuit Court of Appeals petitioner's motion to recall mandate in light of the enactment of the Civil Rights Act of 1991. On December 17, 1991, the court of appeals denied this motion by order entered without opinion.

Respondents' Brief Confirms the Appropriateness of The Court's Expedited Consideration of Whether the Civil Rights Act of 1991 Applies to Pending Cases

Respondents point out, at 7, that in the weeks since the President signed into law the Civil Rights Act of 1991, it has been held inapplicable to pending cases. At latest

count, the act has been held to apply to pending cases in Stender v. Lucky Stores, Inc., No. C-88-1467 (N.D. Cal., Dec. 19, 1991); King v. Shelby Med. Center, No. 91-AR-2258-S (N.D. Ala., Dec. 18, 1991); Davis v. Tri-State Mack Distributions, Inc., No. LR-C-89-912 (E.D. Ark., Dec. 16, 1991); Mojica v. Gannett Co., Inc., No. 90-C-3827 (N.D. Ill., Dec. 6, 1991); and La Cour v. Harris County, No. H-89-1532 (S.D. Tex., Dec. 6, 1991). It has been held not to apply to pending cases in Van Meter v. Barr, 57 FEP Cases 769 (D.D.C., Dec. 18, 1991), motion for certification to Court of Appeals under 28 U.S.C. §1292(b) granted, Jan. 10, 1992; Hansel v. Public Service Co., 1991 U.S. Dist. Lexis 17904 (D. Colo., Dec. 11, 1991); James v. American Int'l Recovery, Inc., C.A. No. 1:89-CV-321-RHH (N.D. Ga., Dec. 3, 1991); and Alexandre v. AMP, Inc., 57 FEP Cases 768 (W.D. Pa., Dec. 5,

1991). In related developments, the Equal Employment Opportunity Commission has ruled that the 1991 act is not retroactive, 60 U.S.L.W. 2418 (Dec. 27, 1991), and as a result has been sued in Nat'l Treasury Employees Union v. Kemp, No. C92-0115 (N.D. Cal., filed Jan. 2, 1992) for alleged violation of E.E.O.C. claimants' rights under the current law.

In the words of the court in Van Meter, 57 FEP Cases at 769, supra, there prevails a "state of total confusion" regarding the applicability of the 1991 act to pending cases. The issue has now been presented to this Court in at least the following cases (in addition to the instant one) in which certiorari is being sought: Hicks v. Brown Group, Inc., No. 90-324 and Gersman v. Group Health Assoc., Inc., No. 91-724. The problem is further exacerbated by the recognized uncer-

tainty in the law of retroactivity. See, Kaiser Aluminum & Chem. Corp. v. Bonjorno, 110 S. Ct. 1570, 1577 (1990). There exists no clear rule to guide the lower courts, and it is the judiciary that will now reap what Congress has recently sown.

The full consequences of the confusion which the judiciary has inherited from Congress will become clear when it is definitively decided, as it must be at some point, whether the 1991 act is or is not applicable to pending cases. For at that time it will become necessary to contend with all the cases which will end up having been "wrongly" adjudicated. The longer the issue remains unresolved, the greater the backlog of such cases, the greater the resulting inequity, and the greater the burden on the judiciary in coping with the consequences. These "bureaucratic" matters are properly of concern to this Court,

given, especially, the vast number of employment discrimination cases pending when the new law was enacted.[1] Cf. Laing v. United States, 423 U.S. 161, 167 (1976).

For these reasons, it is appropriate for the Court to remand this case to the Fourth Circuit for reconsideration in light of the 1991 act. It would be up to this Court whether and to what degree to opine, in a remand order, on the applicability of the Civil Rights Act to pending cases. Obviously, judicial economy will be substantially enhanced were the Court to address the merits of this issue sooner rather than later. Cf., Weinberger v. Ramirez de Arreland, 471 U.S. 1113 (1985) (granting, vacating and remanding

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[1]For this reason, the district court in Van Meter, supra, on January 10, 1992 granted plaintiff's motion in that case for an interlocutory appeal of its adverse decision on this issue.

in banc opinion of the District of Columbia Circuit for consideration of the Foreign Assistance and Related Programs Appropriations Act, Pub. L. No. 98-473 (1985)); Immigration and Naturalization Service v. Nat'l Center for Immigrants' Rights, 481 U.S. 1009 (1987) (granting, vacating and remanding decision of the Ninth Circuit for consideration of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (1986)); Union Gas Co. v. Pennsylvania, 479 U.S. 1025 (1987) (granting, vacating and remanding opinion of the Third Circuit for consideration of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (1986)).

Petitioner's Termination Claim
Is Properly Before This Court

Respondents point out that petitioner did not note an appeal of the issue of whether discriminatory discharge remained actionable under §1981 after Patterson. This is true but of no consequence here. In defending respondents' appeal, petitioner raised and fully briefed this very issue at length. See appellee's brief at 17-18, 34-41. It was also a principal subject of his motion for reconsideration in banc.[2] Petitioner did not have to file a cross-appeal in order to raise this issue since the argument was presented to protect an existing judgment, by demonstrating an alternative ground for reaching the same result. United States v. American Railway

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[2]Mr. Holland also contended that only the appellate court sitting in banc, and not an appellate panel, could change the court's previously-stated position that §1981 bars discriminatory discharge.

Express Co., 265 U.S. 425, 435 (1924); cf. Thurston v. United States, 810 F.2d 438, 447 (4th Cir. 1987).[3] Respondents' citation to settled authority arising out of a party's failure to mention an issue below is inapposite.

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[3]The bank argued on appeal that Mr. Holland's failure to be rehired was not distinguishable from his discharge. Had the court of appeals permitted a discharge claim under §1981, Mr. Holland would have kept his verdict.

Conclusion

For these reasons and those stated in the initial petition filed herein, the Court should issue a writ of certiorari to review the Fourth Circuit's decision in this case.

Respectfully submitted,

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Dated: January 23, 1992

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